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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL, *et al.*,

Petitioners,

—v.—

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

Steven F. Reich
(Counsel of Record)
Thomas A. Robertson
Leecia R. Eve
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Steven R. Shapiro
Marjorie Heins
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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34pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. FAIR USE IS A MEANS OF FOSTERING CREATIVITY AND INNOVATIVE EXPRESSION 2

II. THE FAIR USE DOCTRINE PROVIDES BROAD PROTECTION FOR PARODY, WHICH HAS PLAYED AN IMPORTANT ROLE IN THE DEVELOPMENT OF POLITICS AND ART 6

A. Parody In Politics 7

B. Parody In The Literary Arts 11

C. Parody In The Visual Arts 14

D. Parody In The Musical Arts 17

III. THE COURT SHOULD HOLD THAT COMMERCIAL PARODIES PRESUMPTIVELY DO NOT THREATEN THE POTENTIAL MARKET FOR AN ORIGINAL WORK, AND THAT SUCH USES OF COPYRIGHTED MATERIAL PRESUMPTIVELY ARE FAIR 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Benny v. Loew's Inc.,
239 F.2d 532 (9th Cir. 1956)
aff'd by an equally divided Court,
356 U.S. 43 (1958) 20

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329 F.2d 541 (2d Cir.),
cert. denied, 379 U.S. 822 (1964) 20, 21, 24

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 4

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482 F. Supp. 741 (S.D.N.Y.),
aff'd, 623 F.2d 252 (2d Cir. 1980) 20, 21

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794 F.2d 432 (9th Cir. 1986) 20, 21, 22, 23, 24

Harper & Row, Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985) 3, 4, 6, 22, 23, 24

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46 (1988) 4, 7, 20, 25

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796 F.2d 1148 (9th Cir. 1986) 20

New York Times v. Sullivan,
376 U.S. 254 (1964) 4, 24

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502 U.S. __, 112 S.Ct. 501 (1991) 24

Page

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464 U.S. 417 (1984) 3, 4, 5, 22, 23, 25

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581 F.2d 751 (9th Cir. 1978),
cert. denied, 439 U.S. 1132 (1979) 20

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Copyright Act of 1976, 17 U.S.C. §§101 *et seq.*
§102 . . . . . 2, 3
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Page

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Carroll, Lewis, Alice In Wonderland (1838) 9

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Page

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Page

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A SURVEY OF BURLESQUE AND PARODY
IN ENGLISH (1967) 11

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Standard," 103 Harv.L.Rev. 1105 (1990) 5, 6

Lipman, Jean, and Marshall, Richard,
ART ABOUT ART (1978) 14, 15, 16, 17

Manet, Edouard,
"Olympia" (1863) 14, 15

Melville, Nimmer, B., and
Nimmer, David,
NIMMER ON COPYRIGHT (1992) 21, 22

Note, "The Parody Defense To Copyright
Infringement: Productive Fair Use
After Betamax,"
97 Harv.L.Rev. 1395 (1984) 7, 21

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& AMERICAN AUTHORS
(W. Hamilton ed. 1884) 7

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"The Anti-Romanticist," *in*
MODERN CRITICAL VIEWS: HENRY FIELDING
(H. Bloom ed. 1987) 11

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of Distrust Corrodes,"
N.Y. Times, April 12, 1989 10

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"Manet's Olympia" (1974) 15, 16

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Have Only Humorous Notes,"
20 Smithsonian 84 (Feb. 1990) 18, 19

Page

Richardson, Samuel,
PAMELA: OR, VIRTUE REWARDED (1740) 11, 12

Rivers, Larry,
"I Like Olympia in Blackface" (1970) 15

SAMUEL RICHARDSON, PAMELA: OR,
VIRTUE REWARDED
(William Sale ed. 1958) 12

Stackpole, J. Lewis,
ROSIE IN SQUANDERLAND (1936) 9, 10

Strickland, Carol,
THE ANNOTATED MONA LISA (1992) 14, 15

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"Parody (ii)," *in*
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OF MUSIC AND MUSICIANS
(Stanley Sadie, ed., 1980) 17, 18

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"Venus D'Urbino" (1538) 14, 15

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ON THE GENERAL REVISION OF THE U.S.
COPYRIGHT LAW (July 1961) 6

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"Thirty Are Better Than One" (1963) 17

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MARRIAGE: FIELDING'S MIRROR
OF MORALITY (1973) 13

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Efficiency In Copyright Law,"
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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has been a vigorous advocate of free speech rights and has supported an interpretation of the copyright laws that is consistent with those rights. In furtherance of its principles, the ACLU has appeared before this Court in numerous free speech cases, including the leading copyright case of *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). In addition, the ACLU has recently established an Arts Censorship Project specifically to address questions of artistic freedom, including social and political commentary and parody.

Accordingly, the issues presented by this case involve matters of direct concern to the ACLU. We therefore submit this brief *amicus curiae* to assist the Court in its deliberations.

SUMMARY OF ARGUMENT

Because the question for review as framed by the Court is whether petitioners' commercial parody is a fair use under 17 U.S.C. §107, this case does not require the Court to consider how parody should be defined for purposes of the Copyright Act or whether petitioners' work falls within that definition. Rather, the issue for the Court is the proper application of §107.

The Copyright Act of 1976, 17 U.S.C. §§101 *et seq.*, grants copyright owners a broad range of rights in their original works, but also limits those rights in a number of important ways. One of the most significant limita-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

tions on a copyright owner's rights is fair use, codified at 17 U.S.C. §107, which exempts from the Act's restrictions uses of copyrighted material for purposes such as criticism, comment, news reporting, teaching, scholarship and research. Fair use promotes the advancement of the arts and sciences by giving persons other than the copyright owner the reasonable right to use copyrighted material. Whether a particular use of copyrighted material is a fair one is to be decided on a case-by-case basis.

As the text and legislative history of §107 make clear, Congress intended works of parody to be protected as fair uses. Throughout history, parody has played an important role in the development of politics and art, and that role has been recognized in court decisions that broadly have protected such works under the fair use doctrine. The decision of the Sixth Circuit in this case, which threatens the traditional protection afforded parody, results from an overly literal application of this Court's only two fair use decisions since the 1976 codification of the principle. To assure that parody receives the protection it requires to flourish, the Court should hold that a commercial work of parody presumptively does not threaten the potential market for an original work, and presumptively is a fair use of the copyrighted material.

ARGUMENT

I. FAIR USE IS A MEANS OF FOSTERING CREATIVITY AND INNOVATIVE EXPRESSION

The Copyright Act of 1976, 17 U.S.C. §§101 *et seq.*, represented Congress' first overhaul of the copyright laws since 1909. While the 1976 Act grants copyright owners a broad range of rights in their original works, including control over derivative works based on the original, 17 U.S.C. §§102, 103, it also limits those rights by excluding from the owners' control certain socially

beneficial uses of their material, *see, e.g., id.* at §§107, 108, or by making the works subject to compulsory licenses. *See, e.g., id.* at §115.[2] The most obvious limitation on a copyright owner's rights is the limited term for which copyright protection is granted. *Id.* at §§302-04. An equally important limitation is contained in §102, which provides that ideas and concepts themselves cannot be copyrighted; rather, only the manner in which ideas and concepts are expressed qualify for such protection. *Id.* at §102. These limitations guarantee the public access to the fundamental building blocks of creativity, and give recognition to the settled notion that "[t]he fortunes of the law of copyright have always been closely connected with freedom of expression." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430 n.12 (1984).

Another significant limitation on a copyright holder's rights involves the fair use of his or her copyrighted material. Fair use is a "'privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without [the copyright owner's] consent.'" *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 549 (1985)(*quoting* Horace G. Ball, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

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[2] Section 115 provides, in pertinent part, that:

> [a] compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, *but the arrangement shall not change the basic melody or fundamental character of the work* . . . .

17 U.S.C. §115(a)(2)(emphasis added). Thus, while artists who wish to re-record an existing copyrighted work can obtain a compulsory license, they can do so only if their re-recording leaves intact the "basic melody or fundamental character of the work." *Id.* A compulsory license was not available to the petitioners in this case because their parody altered the fundamental character of Roy Orbison's and William Dees' original work.

The doctrine is "one of the most important and well-established limitations on the exclusive right of copyright owners," H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5678)(hereinafter "House Report"), and is "'a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.'" *Harper & Row*, 471 U.S. at 549 (quoting Ball, *supra* p.3, at 260).

By promoting the broad dissemination of creative works, the fair use doctrine helps assure that debate on political and artistic matters is "uninhibited, robust, and wide-open . . . ." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Discourse on these subjects is "'essential to the common quest for truth and the vitality of society as a whole,'" and the Court has been "particularly vigilant to ensure that individual expressions" on these issues "remain free from governmentally imposed sanctions." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988)(*quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984)). To be sure, fair use "creates tensions between the Copyright Act's goal of protecting an author's works and first amendment principles of ensuring the unimpeded flow of information . . . ." Sarah Deutsch, "Fair Use in Copyright Law and the NonProfit Organization: A Proposal for Reform," 34 Am.U.L.Rev. 1327, 1328 (1985). The doctrine therefore calls for a careful balancing of "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other . . . ." *Sony,* 464 U.S. at 429. Properly considered, fair use is not an "occasionally tolerated departure from the grand conception of the copyright monopoly . . . [but rather] a necessary part of the

overall design." Pierre N. Leval, "Toward a Fair Use Standard," 103 Harv.L.Rev. 1105, 1110 (1990).

Prior to its codification as part of the Copyright Act, fair use existed only as a common law principle. House Report at 65. Codification of the doctrine in §107 of the Act[3] was intended to restate prior law and not "change, narrow, or enlarge it in any way." House Report at 66. Nevertheless, Congress in §107 "identifie[d] [the] various factors that enable a court to apply an 'equitable rule of reason' analysis to particular claims of infringement." *Sony,* 464 U.S. at 448 (footnote omitted). Congress singled out "criticism, comment, news reporting, teaching . . . scholarship, or research" as the kinds of fair uses of copyrighted material that should be encouraged. 17 U.S.C. §107.

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[3] Section 107 provides:

> [n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 17 U.S.C. §107 (Supp. 1993).

The Court has observed that §107 requires "a case-by-case determination whether a particular use is fair," *Harper & Row,* 471 U.S. at 549, and that inquiry need not be limited to consideration of the four factors set forth in the statute. "The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright." Leval, *supra* p.5, at 1110-11. Because parodies have been important in the development of politics and art, §107 should be applied in a manner that broadly protects those works.

II. THE FAIR USE DOCTRINE PROVIDES BROAD PROTECTION FOR PARODY, WHICH HAS PLAYED AN IMPORTANT ROLE IN THE DEVELOPMENT OF POLITICS AND ART

Congress intended §107 to provide broad protection for parody as a form of fair use. That intent is reflected in the text of the section, which, as noted earlier, explicitly provides that the use of copyrighted works "for purposes such as criticism [or] comment" is a favored use. *Id.* In addition, both the Senate and House reports prepared in connection with passage of the 1976 copyright law revisions list as an example of "the sort of activities the courts might regard as fair use" the "use in a parody of some of the content of the work parodied." S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975)(hereinafter "Senate Report"); House Report at 65. The Senate and House reports mirrored the views expressed in a report prepared by the Register of Copyrights which argued that a statutory codification of the fair use doctrine should be broad enough to include works of parody. U.S. Register of Copyrights, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (July 1961).

The legislative history of §107 reflects the fact that parody has been vital to the development of politics and art. Charles C. Goetsch, "Parody as Free Speech -- The Replacement of the Fair Use Doctrine by First Amendment Protection," 3 W. New Eng.L.Rev. 39, 42 (1980). "The reason for the universal appeal of parody is twofold: Its high potential as a form of entertainment and its high potential as a vehicle for social and literary criticism." *Id.* at 41. Such works draw "'our attention to the defects of some authors, whose stilted language, and grandiloquent phrases, have veiled their poverty of ideas, their sham sentiment, and their mawkish affectations.'" Note, "The Parody Defense To Copyright Infringement: Productive Fair Use After Betamax," 97 Harv.L.Rev. 1395 & n.4 (1984)(*quoting* 1 Walter Hamilton, Introduction to I PARODIES OF THE WORKS OF ENGLISH & AMERICAN AUTHORS I (W. Hamilton ed. 1884)).

To be sure, parodies may treat their subjects harshly or with outright disdain or contempt. But the pointed humor of such expressions is precisely what makes them deserving of broad protection under the copyright laws. *Cf. Hustler,* 485 U.S. at 54 ("[d]espite their sometimes caustic nature . . . graphic depictions and satirical cartoons have played a prominent role in public and political debate"). Society would be a far poorer place were it not for the enduring works of parody that have spurred the development of politics and art.

A. Parody In Politics

Parody has been used for centuries to mock and criticize political opponents, government policies, politicians and the political process itself. For example, in late 1776, the New York press printed a parody of the Declaration of Independence, which had been signed only months earlier. Bruce Granger, POLITICAL SATIRE IN THE AMERICAN REVOLUTION, 1763-1783, at 128 (1960). The

parody opened with the actual preamble to the Declaration of Independence, but then substituted a list of alleged abuses by the Continental Congress for the list of Royal abuses contained in the original. Like the original, the parody concludes with a declaration:

> [w]e therefore . . . do renounce and disclaim all allegience, duty, or submission to the Congress, or to any government under them; and declare that the united Colonies, or States so called, neither are, nor of right ought to be, independent of the Crown of Great-Britain . . . and in the support of this Declaration . . . [w]e mutually pledge to each other, and to the Crown and Empire of Great Britain, our lives, our fortunes, and our sacred honor.

Id. at 129 (quotation and citation omitted).

Not all parody created during the founding of the Nation focused on matters as exalted as liberty and independence. Professor Granger notes that near the end of the Revolutionary War, the new Congress' inability regularly to pay its soldiers caused a rise in desertions and short-term enlistments. *Id.* at 201. Congress' financial problems became particularly acute in 1780, prompting the issuance of an emergency order stating that "the officers who shall continue in the service to the end of the war, shall . . . be entitled to half pay during life, to commence from the time of their reduction." *Id.* (quotation and citation omitted). Congress' action led to a parody of the Lord's Prayer:

> Our Delegates in Congress Assembled, Revered be your Characters, your power increased, your will be done in the civil as it is in the Military Line, Give us Month by Month our monthly pay, Pay us our debts as we wish to Satisfy our Creditors, And lead us not into poverty but deliver us the evils of desbandation, for yours is the right, the power, and the Generous intention of rewarding us with half pay throughout our Lives Amen.

Id. (quotation and citations omitted).

In our century, President Franklin Roosevelt was the target of one parodist's acid humor in ROSIE IN SQUANDERLAND, a 1936 work written "[w]ith apologies to Lewis Carroll." J. Lewis Stackpole, ROSIE IN SQUANDERLAND 2 (1936). The parody, subtitled *Billions For Votes*, parrots the style of Lewis Carroll's classic children's work, ALICE IN WONDERLAND (1838), and features, among others, the characters of Rosie ("Franklin D. Roosevelt") and the Dormouse ("The Taxpayer"). *Id.* The cover of the book depicts President Roosevelt in Alice's familiar hoop skirt, with Alice's long wavy hair, pulling a white rabbit out of a hat. *Id.* at 1. As *Rosie In Squanderland* begins:

> Rosie was lying on a soft bank composed of the fortune of bonds and stock certificates which she had inherited from her ancestors, thrifty people who had saved more than they spent.
>
> She was fast falling into a doze, dreaming of all the ways she would like to spend other people's money . . . .

Id. at 3. In the story, Rosie, like Alice, encounters a White Rabbit who leads her on a curious journey. At one point, Rosie says to the White Rabbit:

> You don't know me . . . . The same rules that apply to other people, don't apply to me. For instance, I can pull myself out of debt by spending more and more money. No one else has ever been able to do that. But I can, because . . . it is not my money.

> It belongs to the Dormice, and they are just too damn dumb to understand what I am doing to them.

Id. at 5 (quotation omitted). By the end of the parody, the Dormouse begins to question Rosie's view of the world, leading the Hatter and March Hare to proclaim in unison:

> Twinkle, twinkle, little Rosie. How I wonder what this cosey New Deal system would become, If all Dormice weren't dumb?

Id. at 19 (quotation omitted).

More recently, "the tensions between Foreign Service officers and the inner circle surrounding [former] Secretary of State James A. Baker 3d [were] vented in a wicked parody of the State Department employee newsletter." Robert Pear, "At State, The Acid of Distrust Corrodes," N.Y. Times, April 12, 1989, at A16. The parody, which was dated April 1, was "billed as a lighthearted spoof in the spirit of April Fools' Day." *Id.* However, the parody revealed "a measure of distrust" that one expert said "reflects what a lot of people feel in [the State Department] building." *Id.* (quotation omitted).

In the style of the State Department newsletter, the parody reported that "[t]he Baker team has let it be known that it is very difficult to be a small island of skilled bureaucrats in the middle of a sea of inept Foreign Service officers." *Id.* (quotation omitted). Another item reported that in "a major step toward showing trust to the department's career employees," the Secretary of State had "introduced himself to his personal secretary the other day." *Id.* (quotation omitted). The spoof, which "[l]ike all telling humor . . . has a kernal of truth in it[,]" was said to have hit the mark to such a great degree that it left the Secretary of State "seething." *Id.*

B. Parody In The Literary Arts

Parody in literature first appeared in ancient Greece and since has been instrumental in the development of Western literature. Not only is literary parody a unique brand of literary criticism, it is also an important literary genre and a rich and vibrant source of humor. Linda Hutcheon, A Theory of Parody 2, 29 (1985); George Kitchin, ed., A Survey of Burlesque and Parody in English ix (1967). As a form of literary criticism parody is unique. By exaggerating or distorting the qualities of an original work, literary parody offers an inside look at the weaknesses of an original text and thus "differs from other kinds of literary criticism in that it breathes the very spirit of the style or idea it seeks to criticize." Robert P. Falk, ed., American Literature in Parody 14 (1955). Parody "seize[s] upon sham and pretense in the literary world and point[s] out the difference between originality and flim-flam." *Id.*

In addition, many parodies are valuable works of literature wholly apart from the objects of their ridicule. Henry Fielding's Shamela (1741) and Max Beerbohm's A Christmas Garland (1912) are often cited as parodies that rival or exceed the objects of their derision. Ronald Paulson, "The Anti-Romanticist," *in* Modern Critical Views: Henry Fielding 60-61 (H. Bloom ed. 1987); John Felstiner, "Max Beerbohm and the Wings of Henry James," *in* The Surprise of Excellence 206-07 (T.G. Riewald ed. 1974). Fielding's Shamela is widely regarded as "one of the most famous and effective parodies of English literature." David Baguley, "Parody and the Realist Novel," 55 U. Toronto Q. 94, 95 (1985).

Fielding's work ridicules both the style and substance of Samuel Richardson's epistolary novel Pamela: or, Virtue Rewarded (1740), which itself was widely acclaimed upon publication. Wilbur L. Cross, The History of Henry Fielding 302 (1918). The appeal of Richardson's novel was based on the character and morality of

Pamela, its narrator and heroine. Unlike many other literary characters of the period, Pamela, a young servant, was bright and virtuous. Over the course of the novel, she outwits the bumbling and numerous advances of a Mr. B--, the well-to-do son of Pamela's deceased mistress. After repeatedly fleeing Mr. B--'s clutches and finally returning to her parents' home with her virtue intact, Pamela is asked to marry Mr. B--, and eventually does so, thereby becoming a "lady." Richardson's message is that propriety and chastity in women will be rewarded, in this case through marriage to a wealthy man.

SHAMELA contains many of the same scenes as PAMELA, but the plot and narration are altered in order to ridicule Richardson's suggestion that sexual virtue leads to financial reward. Fielding's Shamela still winds up marrying the equivalent of Mr. B--, whom Fielding names "Mr. Booby," but the two are married because Shamela's "innocence" is used in cunning fashion to lure Mr. Booby to her. Fielding's subtle humor is revealed by comparing Shamela's reaction to her suitor's romantic advances to that of Pamela. In PAMELA, Richardson describes how Mr. B-- "offered to take [Pamela] on his knee, with some force," and "by force kissed [her] neck and lips." SAMUEL RICHARDSON, PAMELA: OR, VIRTUE REWARDED 25 (William Sale ed. 1958). Horrified by Mr. B--'s behavior, Pamela frees herself from his clutches and runs to safety. *Id.* at 26.

In describing the same encounter, Fielding's heroine writes in a letter that Mr. Booby "caught me in his arms, and kissed me till he made my face all over fire . . . . O! What precious fools men are! And so I flung from him in a mighty rage, and *pretended as how* I would go out at the door; but when I came to the end of the room, I stood still, and my master cryed out . . . come hither . . . ." Henry Fielding, JOSEPH ANDREWS AND SHAMELA 312 (Martin Battestin ed. 1961)(emphasis added). As one scholar has observed, "[t]he key to the parody

here resides in Fielding's words 'pretended as how'; for although Shamela makes a calculated show of indignation and does not want to leave the room, Pamela did run from it in spite of her desire for Mr. B-- in marriage." Maurice Johnson, FIELDING'S ART OF FICTION 28 (1961). As the passages illustrate, "Fielding annihilates Pamela's morality by skillfully manipulating Richardson's own inventions." Murial Brittain Williams, MARRIAGE: FIELDING'S MIRROR OF MORALITY 50 (1973). In SHAMELA, "characters, scenes, and even dialogue are often reproduced *almost identically*" from Richardson's original work. *Id.* (emphasis added).

In this century, Max Beerbohm has shown that parody remains a vital genre. In his collection, A CHRISTMAS GARLAND, Beerbohm pokes fun at the works of 17 authors, from Rudyard Kipling to Joseph Conrad. Beerbohm, *supra* p.11, at vii (1926). Perhaps the most famous among the collection is "A Mote in the Distance," a send-up of the writings of Henry James. Felstiner, *supra* p.11, at 206. In "A Mote," Beerbohm parodies James by describing simple events in James' intricate narrative style. For example, in describing a character's wake from sleep, Beerbohm writes that,

> [t]he consciousness of dubiety was, for our friend, not, this morning, quite yet clean-cut enough to outline the figures on what she had called his "horizon," between which and himself the twilight was indeed of a quality somewhat intimidating.

Beerbohm, *supra*, at 3. By capturing the idiosyncratic aspects of James' style -- "brokenly qualified sentences," "syntactical quibbles," "metaphors worried and reworried," Felstiner, *supra* p.11, at 206 -- Beerbohm's story becomes as much James' work as his own. One authority on Beerbohm has written that "A Mote" is a "perfect mimicry of [James'] style . . . . [T]he parody is like the original because, in both, part of the reader's pleasure

comes from discovering those inherently caricatural touches where the style proclaims itself as Jamesian." Lawrence Danson, MAX BEERBOHM AND THE ACT OF WRITING 150 (1989).

C. Parody In The Visual Arts

Parody has served as a particularly important developmental tool in the visual arts. Historically, artists have learned their craft by copying the original works of recognized masters. As one art historian has noted, "[c]opying or quoting from earlier cultural artifacts were the early approved methods of instruction for young visual artists." Bruce Allistair Barber, "Appropriation/Expropriation: Convention or Intervention?," 33 Parachute 29, 30 (1983). For the visual artist, "copying . . . is one method . . . of learning, of acquiring new knowledge and skills with which to gain control over one's world." *Id.*

Throughout history, as young artists have matured, they often have progressed from literal copying of great works to parodying them. Hutcheon, *supra* p.11, at 35. By parodying masterpieces, artists allow for immediate comparisons of their works with those of recognized authorities on the subject. Admittedly, the viewer of a parody feels "a certain jolt when [h]e first recognize[s] the ingredients of this visual pun" that has been created; however, "[h]e also sense[s] that it was a stroke of genius to put them together in this unique way." H.W. Janson, HISTORY OF ART 11 (3d ed. 1986).

One of the most beloved Modernist painters, Edouard Manet, was a master of parody. His famed work, "Olympia" (1863), pokes fun at Titian's "Venus D'Urbino" (1538) and other Renaissance portrayals of female nudes. Manet's "Olympia" copies the pose of Titian's "Venus": a reclining figure, head to the left, her body propped up by pillows. Jean Lipman and Richard Marshall, ART ABOUT ART 98 (1978). *See also* Carol Strickland, THE ANNOTATED MONA LISA 71, 101 (1992). In

Manet's version, the reclining figure is being presented a bouquet of flowers by a black maidservant. *Id.* However, in contrast to Titian, whose ethereal subject was the goddess Venus, Manet not only depicts a human figure, but a prostitute with a bow tied around her neck and a flower behind her ear. *Id.* at 101. Far from the soft Renaissance ideal, Manet's Olympia has been called "a female gorilla" because of her muscular appearance. *Id.* at 71. Manet's choice of a human figure -- and indeed a prostitute -- mocks Titian's idealized selection of a goddess. *Id.*

Interestingly, Manet's work has itself been the subject of parodies by later artists. The two best known parodies of "Olympia" were created by Larry Rivers and Mel Ramos. Larry Rivers' "I Like Olympia in Blackface" (1970) contains two distinct images. The top half of the construction depicts Manet's "Olympia" while the bottom half reverses the races of Manet's original subjects, resulting in a white maidservant waiting on a confident, reclining, black female. As two art historians have noted:

> Larry Rivers's painted construction doubled Manet's idea for another kind of social comment, showing, like a transformed mirror image, a new white servant for the now black Olympia . . . .

Lipman and Marshall, *supra* p.14, at 99. *See also* Strickland, *supra* p.14, at 71. More recently, Mel Ramos created "Manet's Olympia" (1974), a work that copies many elements of the Manet original: the pose of the reclining nude, the pillows, the bow around her neck and the maidservant presenting the bouquet of flowers. However, in contrast to the original, Ramos' Olympia is soft, voluptuous and coquettish. Moreover, in contrast to the imprecise, patchy colors used by the modernist Manet, Ramos has applied a hard, glossy finish to his work that makes his subject look like a *Playboy* centerfold. Hutcheon, *supra* p.11, at 47. Professor Hutcheon has

written that,

> through a second level of parody (of *Playboy* pinups) the narcissism of modern woman [is what] is satirized. Perhaps Ramos is also suggesting, by the parodic juxtaposition, that what we find erotic today may, indeed, not have changed. He reworks Manet's Olympia . . . in much the same way [as Manet reworked his subject from Titian].

Id.; *see also* Lipman and Marshall, *supra* p.14, at 99.

During the twentieth century, parodies in the visual arts have become even more bold. Both Marcel Duchamp and Andy Warhol, for example, have borrowed not only elements of the original works of others, but in some instances the entire original work itself. Examples of this brazen kind of parody are seen in both artists' remakes of Leonardo DaVinci's "Mona Lisa" (1506). The original "Mona Lisa" is well known. The painting depicts a serene female seated in three-quarters view, wearing a brown dress. Leonardo's subject has sleek, dark hair parted down the center, and a complexly inward smile that perhaps is her best-known feature. Duchamp's 1915 parody of Leonardo's work is an exact copy of the original with two alterations. First, Duchamp appended a large black moustache to the subject's angelic face. Second, he changed the title of the work to "L.H.O.O.Q." which, when pronounced in French, makes a distinctly "off-color pun." Janson, *supra* p.14, at 693; Lipman and Marshall, *supra* p.14, at 57. But Duchamp's fun at the expense of Leonardo did not stop there. Duchamp continued his play on "Mona Lisa" in 1965 by signing an unaltered reproduction of the Leonardo original and calling it "L.H.O.O.Q. Shaved." Lipman and Marshall, *supra* p.15, at 57. Thus, in his original parody, Duchamp negated the authority of the Leonardo masterpiece by defiling it with graffiti. Next, Duchamp negated his negation by removing the offending material and simply re-

producing the original with a new title.

Finally, in classic pop-art fashion, Andy Warhol's 1963 parody, titled "Thirty Are Better Than One," shows thirty identical images of the Mona Lisa silk-screened onto one canvas in checkerboard fashion, six across and five down. Warhol's point was unmistakable:

> [t]he pop ironic commentary is clear in his title -- Thirty Are Better Than One -- implying a satire of a consumer society that loves quantity more than quality and therefore can use a popular icon of highbrow art [repeated thirty times] as a mass-produced product.

Hutcheon, *supra* p.11, at 47; *see also* Lipman and Marshall, *supra* p.14, at 57.

D. Parody In The Musical Arts

Like writers and visual artists, musical composers have used parody throughout the centuries as a form of creative expression designed to deflate the authority of existing compositions and musical standards. The operatic genre, with its strict conventions and grand aspirations, has provided much of the source material for musical parodists over the ages. Michael Tilmouth, "Parody (ii)," *in* THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 239 (Stanley Sadie, ed., 1980). Hundreds of parodies were written in the seventeenth and eighteenth centuries of the enormously popular but pompous French operas. The French operas' "unrelieved solemnity . . . [t]heir high-flown sentiments, their pretentious diction, all naturally stimulated the ribaldry of irreverent spirits. Under such circumstances, parody was almost inevitable." Grout, Donald J., "Seventeenth Century Parodies of French Opera -- Part I," 27 The Musical Quarterly 211, 219 (1941).

Opera is not the only musical genre that has fallen prey to the irreverent and critical voice of the musical parodist. Masters of the classical era have also exposed

the absurdities of their craft. For example, "[e]ven the great Mozart, sublime practitioner of the classical art, got in his digs at some of the musical foibles of his own time. His . . . [composition] entitled 'A Musical Joke' mimics some of the cliches rampant among the lesser composers of the 18th century, and does so with practiced drollery and even a touch of cruelty." Alan Rich, "The Bach Whose Works Have Only Humorous Notes," 20 Smithsonian 84 (Feb. 1990). Parody has been employed by such other classical masters as Wagner, Bartok and Debussy. Tilmouth, *supra* p.17, at 240. For example, in his popular "Concerto For Orchestra," Bartok interrupts the "Intermezzo" section with a mocking quotation of Shostakovich's "Symphony No. 7" lasting nearly a third of the section. As one musicologist has written of the Bartok parody:

> trumpets give a Bronx cheer; high strings and woodwinds shriek derision . . . woodwinds trail off in giggles; trombones fart, *glissando*. The whole wind band combines trills with an um-pah bass to introduce . . . violins in a varied repetition of the Shostakovich tune . . . .

William Austin, "Bartok's Concerto for Orchestra," *in* 18 The Music Review 21, 37 (G. Sharp ed. Feb. 1957). Similarly, in "The Golliwog's Cakewalk," "Debussy quotes the opening motive of Wagner's 'Tristan' [and 'Isolde'], thumbs his nose at it with a few *staccato* chords, and reharmonizes its top melody in a banal cadence." *Id.* at 39.

The tradition of parody in classical music, like that in opera, derives from the fact that the "conventions of classical music are weighed down with enough artificialities, stiff-backed formalities and just plain absurdities that merely recounting them straight, or with the slightest shading of emphasis, can induce high hilarity." Rich, *supra* p.18, at 84. Perhaps the foremost modern-day

practitioner of the classical parody is Peter Schickele, whose compositions under the name "P.D.Q. Bach" spoof "music's most-venerated mannerisms." *Id.* at 86. Schickele's "1712 Overture," for example, is "an observant takeoff" on Tchaikovsky's much-loved "1812 Overture." *Id.* at 88. Tchaikovsky's composition features a battle, complete with cannons, between a lushly arranged Russian folk melody and several other competing tunes, with the first folk melody ultimately emerging triumphant over its "enemies." P.D.Q. Bach's parody replicates Tchaikovsky's theme, but uses equally lush arrangements of such familiar melodies as "Yankee Doodle" and "Pop! Goes the Weasel" to play out an intricate musical battle amidst the exploding balloons that replace Tchaikovsky's cannons. *Id.*

Musical parody has, of course, also flourished outside the operatic and classical realms. For example, a popular form of musical parody in early seventeenth century England was found in the "city comedy." The city comedy arose in response to the emotional extravagance of the Elizabethan theatre, for which William Shakespeare's works set the standard. Linda Phyllis Austern, "Musical Parody in the Jacobean City Comedy," *in* 66 Music & Letters 355 (Edward Olleson et al., eds., Oct. 1985). The city comedy eschewed "[k]ings, courts and countryside" for the realistic settings and manner of speech of contemporary seventeenth century London. *Id.* A classic example of parody in the city comedy comes from Act IV of Thomas Dekker's and John Webster's 1605 work, "Northward Ho." *Id.* at 358. In their work, Dekker and Webster borrow an innocent lover's ballad from the songbook of an Elizabethan songwriter and transform it into a lewd "parody of fallen womanhood" sung by a "comical old bawd." *Id.* As one scholar has written:

> [a] simple alteration of the [original] text renders it as irreverently obscene as the

> singer herself, for the intense emotion and frustrated passion of the original are transformed into a hilariously unsentimental image of the basest sort of physical love . . . .

Id. at 359.[4]

III. THE COURT SHOULD HOLD THAT COMMERCIAL PARODIES PRESUMPTIVELY DO NOT THREATEN THE POTENTIAL MARKET FOR AN ORIGINAL WORK, AND THAT SUCH USES OF COPYRIGHTED MATERIAL PRESUMPTIVELY ARE FAIR

Courts have not hesitated broadly to protect works of parody as fair uses and, in so doing, explicitly have recognized parody's role in the development of politics and art. *See, e.g., Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986);[5] *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Warner Bros., Inc. v. ABC, Inc.*, 720 F.2d 231 (2d Cir. 1983); *Elsmere Music, Inc. v. NBC Co.*, 482 F.Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Berlin v. E.C. Pub., Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). *But see Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956)(parody not to be treated differently from other kinds of infringements), *aff'd by an equally divided Court*, 356 U.S. 43 (1958).[6] For example, in *Berlin*, 329 F.2d 541, Judge Kaufman, writing for a panel that included then-Judge Marshall, rejected composer Irving Berlin's arguments that parodies of his songs published by *Mad Magazine* infringed the copyrights for the original material. Berlin contended, in particular, that *Mad's* use was not a fair one because the Magazine had a commercial motive. *Id.* at 543. However, the court held that that argument failed to recognize "parody and burlesque as independent forms of creative effort possessing distinctive literary qualities worthy of judicial protection in the public interest." *Id.* The court concluded that "parody and satire *are* deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism." *Id.* at 545 (emphasis in original). *See also* 3 Melville, B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT, §13.05[C] at 13-102.25 -- 102.26 (1992)("[o]nly by the recognition of a fair use defense is society likely to reap the benefit of [parody]").

Likewise, in *Elsmere*, 623 F.2d 252, the district court protected as a fair use a parody of the "I Love New York" advertising jingle performed on the popular television show "Saturday Night Live." The court held that the parody, which focused on a mythical city called Sodom and was entitled "I Love Sodom," was a fair use because it was "clearly an attempt . . . to satirize the way in which New York City has attempted to improve its somewhat tarnished image through the use of a slick advertising campaign." *Id.* at 745. The Second Circuit affirmed the district court's judgment upon the simple observation that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody . . . ." 623 F.2d at 253.

Finally, in *Fisher*, 794 F.2d 432, the Ninth Circuit held that a commercial parody of the 1950s classic song "When Sunny Gets Blue" was a fair use. In its opinion, the Ninth Circuit observed that parodies "'play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author.'" *Id.* at 437-38 (*quoting* Note, *supra*

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[4] The similarities to the work at issue in this case are unmistakable.

[5] The *Hustler* case involved the unauthorized copying of the same satirical cartoon at issue in this Court's opinion in *Hustler*, 485 U.S. 46.

[6] Later, in *Walt Disney Prods. v. The Air Pirates*, 581 F.2d 751, 757 n.13 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), the Ninth Circuit repudiated *Benny*, stating that "we necessarily disagree with [*Benny's*] dictum that a parody is treated no differently than any other taking."

p.7, at 1411). Of particular importance in this case, the Ninth Circuit specifically rejected the copyright owner's contention that the defendant's use of the original material was not a fair one because he had asked for and been refused permission for a license. *Id.* at 437. Indeed, the court held that "[t]he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought." *Id.* *See also* Melville, Nimmer and Nimmer, *supra* p.21, at §13.05[C] at 13-102.26 ("satire, etc., of the work itself by its very nature is unlikely to be the subject of a license from the author of a serious work"); Alfred C. Yen, "When Authors Won't Sell: Parody, Fair Use, And Efficiency In Copyright Law," 62 U.Colo.L.Rev. 79, 90 (1991)("[b]ecause parodists seek to lampoon original works, they are unlikely to secure permission from the copyright holder to use the copyrighted material").

The Sixth Circuit's decision in this case jeopardizes the traditional protection afforded parody by applying in overly literal fashion language in *Sony* and *Harper & Row* concerning the effect of a derivative work's commercial nature on the §107 analysis. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1436, 1438 (6th Cir. 1992). In *Sony*, the Court considered whether the makers of video tape recorders ("VTRs") were contributory infringers of the copyrights held by television production companies. 464 U.S. at 420. Sony, a maker of VTRs, contended that home videotaping was a noncommercial fair use under §107, and the Court agreed. 464 U.S. at 454-55.

In the course of its *Sony* opinion, however, the Court suggested that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copy-

right . . . ." *Id.* at 451.[7] The Court also stated that harm to the potential market for the original work may be presumed if the derivative work is commercial in nature. *Id.* Thus, under *Sony*, if the derivative work at issue is commercial in nature, factors one and four of the §107 test presumptively will weigh in favor of the copyright owner and against the person seeking to use the copyrighted material, at least where verbatim copying is involved.

Those principles were reaffirmed in *Harper & Row*. There, the Court considered whether *The Nation Magazine* infringed the copyright held by Harper & Row for the then-unpublished memoirs of former President Ford. 471 U.S. at 542. *The Nation* obtained a copy of the unpublished manuscript and published verbatim excerpts of the work prior to its publication by Harper & Row. *Id.* at 543. The Court reversed the Second Circuit's finding that *The Nation*'s use of the manuscript was a fair one and, in so doing, reaffirmed the standards applied in *Sony*. 471 U.S. at 561-69.

When works of parody are at issue, the *Sony* presumptions applicable to the first and fourth §107 factors, *see* n.3, *supra*, fail to advance the policy underlying the Copyright Act. The fourth factor, which the Court has called "the single most important element of fair use," seeks to determine whether a derivative work "materially impair[s]" the potential market for the original material. *Harper & Row*, 471 U.S. at 566-67 (quotation omitted). When applying the test to a parody, the "economic effect of . . . the parody's critical impact must be excluded." *Fisher*, 794 F.2d at 437. Such an exclusion is required

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[7] The fact that a derivative work is commercial in nature, of course, is not dispositive of the fair use inquiry. 464 U.S. at 449. The *Sony* presumption is merely "'an express recognition that . . . the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.'" *Id.* at 449 n.32 (*quoting* House Report at 66).

because the "economic effect . . . with which we are concerned is not its potential to destroy or diminish the market for the original -- any bad review can have that effect -- but rather whether it *fulfills the demand* for the original. *Id.* at 438 (emphasis in original). Thus, the pertinent question is whether the parody usurps, and thereby fulfills, the demand for the original. Jay Dratler, Jr., "Distilling the Witches' Brew of Fair Use in Copyright Law," 43 U. Miami L.Rev. 233, 331 (1988).

As we have seen, the *raison d'etre* of a parody is to mock an original work and not to usurp demand for it in the marketplace. As the Ninth Circuit observed in *Fisher,* it is highly unlikely that the lover of an original work would instead purchase a parody of it, or vice-versa. 794 F.2d at 438. *See also Berlin,* 329 F.2d at 545. That is especially true here, where no reasonable person could think that a lover of the original ballad made famous by Roy Orbison would be satisfied by purchasing petitioners' version instead. Moreover, if we recognize that a parody and an original work fulfill different demands in the marketplace, then the fact that a parody is commercial in nature should not subject it to government-imposed restraints which otherwise could not be sustained. *Cf. Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. __, 112 S.Ct. 501 (1991)(commercial gain of authors irrelevant to whether their speech is protected); *New York Times Co. v. Sullivan*, 376 U.S. at 265-66 (same). Indeed, the Court has recognized that the copyright laws specifically are designed to offer financial incentives to those who produce creative works. *Harper & Row,* 471 U.S. at 546. Included among those numbers are the creators of parodies.[8]

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[8] The majority opinion in the court below suggests that not only must harm to the potential market for original work be considered, but also harm to the potential market for derivative works. 972 F.2d at 1439. Whatever validity that notion might have in other contexts, the Sixth (continued...)

The same analysis applies under the first §107 factor. A commercial parody should not be considered presumptively unfair simply because it is commercial in nature. Whether his work is good or bad, tasteful or not, the parodist advances the arts and sciences by offering a critical look at existing material. Because the demand for that work will not usurp demand for the original, there is nothing presumptively wrong with the use of the original material. One author has suggested that the first §107 factor has "at its core a simple issue: whether the type and purpose of the use fall within favored categories." Dratler, *supra* p.24, at 290. As we have seen, parody is a favored use and the applicable *Sony* presumption therefore fails to advance the policies underlying the Copyright Act when such works are at issue.

The Senate report accompanying the bill that became the Copyright Act of 1976 recognized that:

> [w]ith certain special exceptions (*use in parodies* or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.

Senate Report at 65 (emphasis added). In order to afford parody the broad protection that Congress intended it to have -- and that it needs to flourish -- the Court should hold that works of parody, though commercial in nature, presumptively do not threaten the market for the original copyrighted material and presumptively are fair uses.

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[8] (...continued)
Circuit's analysis would undermine settled free speech principles when works of parody are at issue, for it would allow a copyright holder to control who criticizes his or her own work and the precise content of the criticism. *Cf. Hustler*, 485 U.S. at 56 (actual malice standard protecting critical speech "is necessary to provide 'breathing space' to the freedoms protected by the First Amendment").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court below and instead affirm the judgment of the district court.

Respectfully submitted,

Steven F. Reich
(*Counsel of Record*)
Thomas A. Robertson
Leecia R. Eve
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Steven R. Shapiro
Marjorie Heins
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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